CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, and Notices

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 29 JANUARY 25, 1995 NO. 4

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 95–6)

SYNOPSES OF DRAWBACK DECISIONS

The following are synopses of drawback contracts approved August 10, 1994 to September 15, 1994, inclusive, pursuant to Subpart C, Part 191, Customs Regulations.

In the synopses below are listed for each drawback contract approved under 19 U.S.C. 1313(b), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the factories where the work will be accomplished, the date the proposal was signed, the basis for determining payment, the Regional Commissioner to whom the contract was forwarded or approved by, and the date on which it was approved.

Dated: December 23, 1994.

WILLIAM G. ROSOFF,
(for John Durant, Director,
Commercial Rulings Division.)

(A) Company: Akzo Chemicals, Inc.
Articles: Quaternary ammonium compound; quaternary ammonium compound blend; fatty nitrile; fatty amine
Merchandise: Tallow fatty acid; fatty nitrile; fatty amine; quaternary ammonium compound
Factories: Morris & McCook, IL
Proposal signed: January 31, 1994
Basis of claim: Used in, less valuable waste
Contract issued by RC of Customs in accordance with § 191.25(b)(2): New York, August 23, 1994
Revokes: T.D. 87–100–B to cover successorship of Akzona Inc., Akzo Chemie America Div., Akzo Specialties, Inc., and ultimate successorship by Akzo Chemicals, Inc.

(B) Company: Akzo Industrial Fibers, Inc.
Articles: Polyester fabric
Merchandise: Polyester filament yarn (Diolen 2500 T)
Factory: Scottsboro, AL
Proposal signed: December 7, 1993
Basis of claim: Appearing in
Contract forwarded to RC of Customs: New York, August 10, 1994

(C) Company: Alltrista Corp.
Articles: Zinc indstrip; zinc liners; dry cell battery shells; battery strip; microzinc 70
Merchandise: Zinc slabs
Factory: Greeneville, TN
Proposal signed: December 30, 1993
Basis of claim: Appearing in
Contract forwarded to RC of Customs: New York, September 2, 1994

(D) Company: Baker Refractories
Articles: Various articles
Merchandise: Various dead-burned magnesias
Factories: York, PA (2)
Proposal signed: May 9, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: Boston, August 26, 1994

(E) Company: Cardinal Manufacturing, Inc.
Articles: Isooctylthioglycolate (IOTG); ethylhexylmercaptoacetate (EHMA); CC–401E; various heat stabilizers; CC–11; CC–101–110; CC–101FC
Merchandise: Thioglycolic acid (aka TGA; mercaptoacetate; mercaptoacetic acid; 2-mercaptoacetic acid; a-mercaptoacetic acid; 2-thioglycolic acid; thiovanic acid; USAF CB–35
Factory: Columbia, SC
Proposal signed: August 1, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: Miami, August 19, 1994
Revokes: Unpublished authorization of May 6, 1994

(F) Company: Chevron Chemical Co.
Articles: High overbased calcium sulfonate detergent (OLOA 247Z)
Merchandise: Sulfonic acid (a/k/a AS–304; HSO–9)
Factories: Pasadena, TX (an agent operating under T.D. 55027(2))
Proposal signed: April 30, 1992
Basis of Claim: Used in
Contract forwarded to RCs of Customs: New Orleans & Houston, August 22, 1994

(G) Company: Du Pont Agrichemicals Caribe, Inc.
Articles: Metsulfuron methyl technical (T–6376); herbicidal formulations of metsulfuron methyl technical (T–6376)
Merchandise: 2-amino-4-methoxy-6-methyl-1,3,5-triazine ("A–4098"); metsulfuron methyl technical; 2-carbomethoxybenzene sulfonyl isocyanate (CMBSI)
Factory: Manati, PR
Proposal signed: June 28, 1994
Basis of claim: Used in
Contract forwarded to RCs of Customs: New York & Miami, September 2, 1994

(H) Company: Du Pont Agrichemicals Caribe, Inc.
Articles: Chlorsulfuron technical; herbicidal formulations of chlorsulfuron technical
Merchandise: 2-chloro benzenesulfonyl isocyanate (CPSI); 2-amino-4-methoxy-6-methyl-1,3,5-triazine (A–4098); chlorsulfuron technical (DPX–W4189)
Factory: Manati, PR
Proposal signed: June 2, 1994
Basis of claim: Used in
Contract forwarded to RCs of Customs: New York & Miami, September 15, 1994

(I) Company: Duracell Inc.
Articles: Dry cell alkaline batteries in various sizes
Merchandise: Duralam 240 fibre PVA laminated separator; duralam 236 fibre PVA laminated separator
Factories: Cleveland, TN; LaGrange, GA; Lancaster, SC
Proposal signed: November 22, 1993
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, August 19, 1994

(J) Company: Eagle Ottawa Leather Co.
Articles: Tanned leather as upholstery for automobiles
Merchandise: Cattle hides, tanned to "crust" condition
Factory: Grand Haven, MI
Proposal signed: February 8, 1994
Basis of claim: Appearing in
Contract forwarded to RC of Customs: Chicago, August 29, 1994

(K) Company: Eastman Chemical Co.
Articles: Various dyes in press cake, powder or paste form
Merchandise: 1,8 dichloroanthraquinone
Factory: Kingsport, TN
Proposal signed: May 12, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, September 7, 1994

(L) Company: Fortafil Fibers, Inc.
Articles: Carbon fiber
Merchandise: Acrylic fiber, textile tow precursor
Factory: Rockwood, TN
Proposal signed: June 7, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: Miami, September 7, 1994

(M) Company: General Motors Corp.
Articles: Magnequench powder; magnets
Merchandise: Neodymium oxide
Factory: Anderson, IN
Proposal signed: April 19, 1994
Basis of claim: Appearing in
Contract forwarded to RC of Customs: Chicago, August 18, 1994

(N) Company: Hoechst Celanese Corp.
Articles: Polyester polymer chip; polyester staple fiber; polyester filament yarn
Merchandise: Purified terephthalic acid
Factories: Salisbury, NC; Spartanburg, SC
Proposal signed: April 5, 1994
Basis of claim: Appearing in
Contract forwarded to RC of Customs: Miami, August 10, 1994
Revokes: T.D. 90–84–N

(O) Company: Hoechst Celanese Corp.
Articles: Various pigments
Merchandise: 5-OXO-1-PHENYL-4, 5-DIHYDROPYRAZOLE-3-CARBOXYLIC ACID ETHYL ESTER (a/k/a Carbethoxy Pyrazolone); 3,3 DICHLOROBENZIDINE (3,3 DCB); ORTHO-PHENYLENE DIAMINE (OPD Flakes); VIOLET R BASE DESALT (a/k/a Carbazol Violet)
Factory: Coventry, RI
Proposal signed: April 27, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, August 22, 1994

(P) Company: Hoechst Celanese Corp.
Articles: Vat dyestuffs
Merchandise: Ortho-phenylene diamine (OPD flakes)
Factory: Coventry, RI
Proposal signed: April 28, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, August 22, 1994

(Q) Company: Hunt-Wesson, Inc.
Articles: Refined cottonseed oil
Merchandise: Off summer yellow cottonseed oil
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative values at the time of separation
Factories: Memphis, TN; Savannah, GA
Proposal signed: May 25, 1994
Contract forwarded to RC of Customs: Long Beach (San Francisco Liquidation Unit), September 2, 1994
Revokes: T.D. 92–39–Q

(R) Company: ICI Acrylics Inc.
Articles: Clear and colored acrylic pellets and sheets
Merchandise: Methyl methacrylate (MMA)
Factories: Memphis, TN; Compton, CA; Olive Branch, MS
Proposal signed: May 20, 1994
Basis of claim: Appearing in
Contract forwarded to RCs of Customs: Long Beach & Chicago, August 22, 1994

(S) Company: The Kent Manufacturing Co.
Articles: Wool yarn
Merchandise: Combed wool top
Factory: Pickens, SC
Proposal signed: May 23, 1994
Basis of claim: Appearing in
Contract forwarded to RC of Customs: Miami, September 15, 1994
Revokes: Unpublished authorization of March 4, 1994

(T) Company: Merck & Co., Inc.
Articles: Imipenem/Cilastatin blend (bulk powder); Imipenem/Cilastatin blend (dosage form) a/k/a PRIMAXIN and TIENAM
Merchandise: 1,1′-Carbonyldiimidazole; Magnesium-p-Nitrobenzyl Malonate Dihydrate; Pentanedioic Acid Derivative-ADC-6; Benzothiazyl Disulfide; Diisopropylethylamine; N,N-Dibenzylethylenediamine Diacetate; L-Cysteine Hydrochloride Monohydrate; D-Carboxamide; 1-Bromo-5-Chloropentane; Sodium Bicarbonate Sterile
Factories: Danville, PA; Elkton, VA; Rahway, NJ; Wilson, NC
Proposal signed: March 14, 1994
Basis of claim: Used in
Contract issued by RC of Customs in accodance with § 191.25(b)(2): New York, August 26, 1994
Revokes: T.D. 94–6–U to cover additional factory location

(U) Company: Primex Plastics Corp.
Articles: Polyethylene terephthalate sheet
Merchandise: Polyethylene terephthalate resin pellets (PET 5511)
Factory: Garfield, NJ
Proposal signed: February 10, 1993
Basis of claim: Appearing in
Contract forwarded to RC of Customs: New York, September 15, 1994

(V) Company: Reilly Industries, Inc.
Articles: 2-amino-5-methylpyridine concentrate
Merchandise: 2-amino-5-methylpyridine front ends (2A5MP)
Factory: Indianapolis, IN
Proposal signed: May 10, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: Chicago, September 9, 1994

(W) Company: Reilly Industries, Inc.
Articles: Flaked 2-amino-5-methylpyridine
Merchandise: 2-amino-5-methylpyridine
Factory: May 10, 1994
Proposal signed: May 10, 1994
Basis of claim: Appearing in
Contract forwarded to RC of Customs: Chicago, September 2, 1994

(X) Company: Sapona Manufacturing Co., Inc.
Articles: Textured nylon yarn
Merchandise: Undyed nylon yarn
Factory: Cedar Falls, NC
Proposal signed: April 25, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, August 22, 1994

(Y) Company: Teledyne Industries, Inc., Teledyne Advanced Materials Div.
Articles: Tungsten alloy parts
Merchandise: Tungsten powder
Factory: Clifton, NJ
Proposal signed: June 10, 1994
Basis of claim: Appearing in
Contract forwarded to RC of Customs: New Orleans, August 24, 1994
Revokes: T.D. 82–182–U

(Z) Company: Westlake Styrene Corp.
Articles: Styrene monomer
Merchandise: Benzene; ethylene; ethylbenzene
Factory: Lake Charles, LA
Proposal signed: May 13, 1994
Basis of claim: Used in, with distribution to the products obtained in accodance with their relative values at the time of separation
Contract forwarded to RC of Customs: Houston, August 23, 1994

(T.D.95–7)

CUSTOMS APPROVAL OF INTERNATIONAL MARINE CONSULTANT, INC., AS A COMMERCIAL GAUGER

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of approval of International Marine Consultants, Inc., Houston, Texas facility as a commercial gauger.

SUMMARY: International Marine Consultants, Inc., of Mineola, New York has recently applied to U.S. Customs for approval to gauge imported petroleum, petroleum products, organic chemicals and vegetable and animal oils under Part 151.13 of the Customs Regulations (19 CFR 151.13) in their Houston, Texas facility. Customs has determined that the Houston, Texas office meets all of the requirements for approval as a commercial gauger.

Therefore, in accordance with Part 151.13(f) of the Customs Regulations, International Marine Consultants, Inc., Houston, Texas facility is approved to gauge the products named above in all Customs districts.

Location:

International Marine Consultants' approved site is located at 3506 Audubon Place, Houston, Texas 77006.

EFFECTIVE DATE: December 28, 1994.

FOR FURTHER INFORMATION CONTACT: Ira S. Reese, Chief, Technical Branch, Office of Laboratories and Scientific Services, U.S. Customs Service, 1301 Constitution Avenue NW, Washington, DC 20229 at (202) 927–1060.

Dated: January, 4, 1995.

A. W. TENNANT,
Director,
Office of Laboratories and Scientific Services.

[Published in the Federal Register, January 12, 1995 (60 FR 3027)]

U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, January 11, 1995.

The following documents of the United States Customs Service, Office of Commercial Operations, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

MODIFICATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF PROPELLER CIRCULATORS USED IN PULP-MAKING PROCESS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (1993), this notice advises interested parties that Customs is modifying a ruling pertaining to the tariff classification of propeller circulators, which are used to reduce stock consistency by mixing stock and dilution water in the pulp-making process. Notice of the proposed revocation was published December 7, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 49.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after March 27, 1995.

FOR FURTHER INFORMATION CONTACT: Larry Ordet, Metals and Machinery Classification Branch, (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 7, 1994, Customs published notice in the CUSTOMS BULLETIN, Volume 28, Number 49, proposing to revoke Headquarters Ruling Letter (HQ) 950352, issued on January 8, 1992, which concerned the classification of propeller circulators. The ruling held that propeller circulators, which are used to reduce stock consistency by mixing stock and dilution water in the pulp-making process, were classifiable under subheading 8439.91.10, Harmonized Tariff Schedule of the United States (HTSUS), which provides for parts of machinery for making pulp of fibrous cellulosic materials. No comments were received in response to this notice.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (1993), this notice advises interested parties that Customs is modifying HQ 950352 to reflect the proper classification of the propeller circulators, according to GRI 2(a), under subheading 8439.10.00, HTSUS, which provides for machinery for making pulp of fibrous cellulosic material. HQ 956831 revoking HQ 950352 is set forth in Attachment A to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: January 9, 1995.

JAMES A. SEAL,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 9, 1995.
CLA–2 CO:R:C:M 956831 LTO
Category: Classification
Tariff No. 8439.10.00 and 8479.82.00

MR. ROBERT L. EISEN
MS. KAREN BYSIEWICZ
COUDERT BROTHERS
1114 Avenue of the Americas
New York, NY 10036–7794

Re: Agitators (horizontal and vertical); HQ 950352 *modified;* HQ 950445; NY 866505; Additional U.S. Rule of Interpretation 1(a); GRI 2(a); EN 84.39.

DEAR MR. EISEN AND MS. BYSIEWICZ:

This is in response to your letter of June 30, 1994, on behalf of Ahlstrom Process Equipment, Inc., to Customs in New York, requesting the classification of chest agitators and

vertical agitators under the Harmonized Tariff Schedule of the United States (HTSUS). Your letter was referred to this office for a response. Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (1993), (hereinafter section 625), notice of the proposed modification of HQ 950352 was published December 7, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 49.

Facts:

The articles in question are horizontal and vertical agitators. The "Salomix Chest Agitators" [hereinafter, "chest agitators"] come in two basic models: the "Type STG" and "Type STB." The chest agitators consist of a shaft, shaft sealing, impellers, bearings and motor. The shaft is protected by a conical frame, and lies in a horizontal position once the agitator is installed in a tank. The main difference between the STG and STB is that the former possesses a gearbox design, while the latter has a V-belt drive. All parts coming in contact with stock are made of acid-proof steel. At importation, neither model will contain a motor, and will either be fully assembled when imported, or assembled in all respects except that the impellers may be unattached from the shaft.

The chest agitators are designed for use in the pulp-making process. They perform three main functions: (1) they keep pulp stock in motion to prevent sedimentation or changes in consistency of the stock; (2) they produce a homogeneous mixture of stock when different stock types, coloring agents or chemicals are added; and (3) they dilute stock with water to create a different consistency of stock. All of these functions are performed on stock or to produce stock. The chest agitators (and vertical agitators, when used in a pulp or paper-making mill) are used prior to the processing of pulp into paper in the headbox, and after the headbox, to return damaged paper to pulp.

The "Salomix Vertical Agitators" [hereinafter "vertical agitators"] consist of a modular system of components, including a shaft, impellers, bearing housing and motor. The vertical agitators have a vertical free shaft—the shaft is placed vertically in the tank which contains the agitator. The vertical agitators may be equipped with either a gearbox design, or V-belt drive.

The vertical agitators will be imported without motors, either fully assembled or with the impellers and/or shaft components unassembled to facilitate transport and handling. You state that the vertical agitators are used to perform the same functions as the chest agitators, and that they are principally used to make cellulosic pulp.

Issue:

Whether the chest agitators and vertical agitators are classifiable as machinery for making pulp of fibrous cellulosic material under subheading 8439.10.00, HTSUS.

Law and Analysis:

The General Rules of interpretation (GRI's) to the HTSUS govern the classification of goods in the tariff schedule. GRI 1 states in pertinent part that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes * * *." The Harmonized Commodity Description and Coding System Explanatory Notes (EN) constitute the Customs Co-operation Council's official interpretation of the Harmonized System. While not legally binding, the ENs provide a commentary on the scope of each heading of the Harmonized System, and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–50, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

You contend that the chest agitators and vertical agitators are classifiable under subheading 8439.10.00, HTSUS, which provides for machinery for making pulp of fibrous cellulosic material. EN 84.39, pg. 1227, states that heading 8439, HTSUS, covers machinery for making fibrous cellulosic pulp from various cellulosic materials * * * whether the pulp is for paper or paperboard making or for other purposes * * *."

1. *Chest Agitators:*

The physical characteristics and design features demonstrate that the chest agitators are used only for processing pulp. They have a horizontal shaft, common to the pulp industry, whereas agitators used in other industries usually have vertical shafts. Moreover, the chest agitators have propellers and shafts developed specifically for the agitation of fibrous stock that agitators for other industries would not have. The propellers are sturdily built to withstand the agitation of pulp, which consists of a thick suspension of wood fibers and

water. They also possess a smooth form that prevents fibers from adhering to sharp corners of the propeller blades. Additionally, the chest agitators have a shaft that is protected by a conical frame, a design feature unique to the pulp industry, which serves to prevent shaft failures and vibrations caused by large volumes of stock impacting the agitator shaft during use. Finally, all parts of the chest agitator coming in contact with the pulp are made of acid-proof steel, a feature adapted to the pulp industry because of the chemicals used in the pulp-making process.

It is our opinion that the chest agitators are principally used for making pulp. *See* Additional U.S. Rule of Interpretation 1(a); HQ 950445, dated February 3, 1992. Accordingly, they are classifiable under heading 8439, HTSUS, which provides for machinery for making pulp of fibrous cellulosic material, and parts thereof.

In HQ 950352, dated January 8, 1992, Customs considered the classification of propeller circulators used in bleach towers. These circulators were composed of a steel shaft, several propeller-like blades, shaft sealing, a v-belt transmission, and were imported without a motor. We determined that the propeller circulators were parts of bleach towers and were classifiable under subheading 8439.91, HTSUS, which provides for stock-treating parts of machinery for making pulp of fibrous cellulosic materials, because they reduced stock consistency by mixing stock and dilution water.

The propeller circulators, like the chest agitators, are independent machines for the production of pulp stock. Both have their own power source and perform distinct operations on stock. Both are used at various stages in the pulp-making process. For example, the chest agitators are used prior to the processing of pulp into paper in the headbox, and after the headbox, to return damaged paper to pulp. It is therefore our opinion that the chest agitators (and propeller circulators) are pulp-making machinery, rather than a part of such machinery.

At importation, neither model of the chest agitator will contain a motor, and will either be fully assembled when imported, or assembled in all respects except that the impellers may be unattached from the shaft.

GRI 2(a) provides as follows:

> Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), entered unassembled or disassembled.

The incomplete chest agitators, imported without motors, consist of a shaft, shaft sealing, impellers and bearings. It is our opinion that, as imported, the chest agitators have the essential character of a complete agitator. Accordingly, the incomplete chest agitators are classifiable, according to GRI 2(a), under heading 8439.10.00, HTSUS, which provides for machinery for making pulp of fibrous cellulosic material. Moreover, they remain classifiable under this provision, even if imported with the impeller detached from the shaft. HQ 950352 is modified accordingly.

2. *Vertical Agitators:*

You contend that the vertical agitators are used to perform the same functions as the chest agitators, and are principally used to make cellulosic pulp. You also claim that the vertical agitators will be sold only to the pulp and paper-making industry. However, sales literature supplied with your request indicates that the vertical agitators are capable of use in a variety of equipment, including storage tanks, production vessels, reactors, dissolvers and fermenters. In addition, the literature indicates that they can be supplied with various types of impellers, such as a paddle, propeller, turbine, dissolver or anchor, depending on the process requirements. The following process applications mentioned in the literature are general in nature:

—to suspend solids, liquids or gases;
—to dissolve solids in liquids;
—to equalize concentrations;
—to blend miscible liquids;
—to keep slurries homogenous;
—to prevent sedimentation.

You contend that the vertical agitators are similar to the chemical mixer of NY 866505, dated September 16, 1991, which was classified under subheading 8439.10.00, HTSUS. The vertical agitators are not similar to chemical mixers used in the pulp bleaching pro-

cess, such as the mixers of NY 866505, as such mixers are not capable of performing the various functions ascribed to the vertical agitators.

It is our opinion that the vertical agitators—general purpose agitators—are not principally used for making pulp. *See* Additional U.S. Rule of Interpretation 1(a). The vertical agitators, even if sold only to pulp and paper mills, can be used in mill applications not directly involved in the manufacture of pulp, such as chemical recovery and wastewater treatment. The vertical agitators lack any special features, such as the specially designed acid proof steel propellers and conical frames found on the chest agitators, which distinguish them from agitators in general. Accordingly, the vertical agitators cannot be classified under heading 8439, HTSUS, and are classifiable, according to GRI 2(a), under subheading 8479.82.00, HTSUS, which provides for mixing, kneading, crushing, grinding, screening, sifting, homogenizing, emulsifying or stirring machines, not specified or included elsewhere in chapter 84.

Holding:

The Salomix Chest Agitator is classifiable under subheading 8439.10.00, HTSUS, which provides for machinery for making pulp of fibrous cellulosic material. The corresponding rate of duty for articles of this subheading is *free*.

The Salomix Vertical Agitator is classifiable under subheading 8479.82.00, HTSUS, which provides for mixing, kneading, crushing, grinding, screening, sifting, homogenizing, emulsifying or stirring machines, not specified or included elsewhere in chapter 84. The corresponding rate of duty for articles of this subheading is 3.7% *ad valorem*.

HQ 950352, dated January 8, 1992, is hereby modified. In accordance with section 625, this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JAMES A. SEAL,
(for John Durant, Director,
Commercial Rulings Division.)

PROPOSED MODIFICATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF A PULLOVER GARMENT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of a pullover garment. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before February 24, 1995.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, N.W. (Franklin Court), Washington DC 20229. Comments submitted

may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington DC.

FOR FURTHER INFORMATION CONTACT: Cathy Braxton, Textile Classification Branch (202) 482–7048.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of a pullover garment.

In New York Ruling Letter (NYRL) 898005, dated June 2, 1994, a pullover garment was classified in subheading 6110.20.2065 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for men's knitted or crocheted cotton pullovers. NYRL 898005 is set forth in Attachment A to this document.

Upon further examination of the subject garment, it is Customs belief that it is not a garment constructed and intended for men; instead the article is a pullover garment designed for women. Therefore, the garment is properly classifiable in subheading 6110.20.2075, HTSUSA, as a women's knitted or crocheted cotton pullover.

Customs intend to modify NYRL 898005 to reflect the proper classification of the pullover garment under 6110.20.2075, HTSUSA. Before taking this action, consideration will be given to any written comments timely received. Proposed Headquarters Ruling Letter (HRL) 956984 modifying NYRL 898005 is set forth in Attachment B to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: December 7, 1994.

JOHN DURANT,
Director,
Commercial Rulings Division.

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, July 2, 1994.

CLA–2–61:S:N:N5:356 898005
Category: Classification
Tariff No. 6110.20.2065

MR. GREGORY FABRICANT
FARREL FORWARDING COMPANY, INC.
150–30 132nd Avenue
Jamaica, NY 11434

Re: The tariff classification of a man's knit pullover from Hong Kong.

DEAR MR. FABRICANT:

In your letter dated May 17, 1994 you requested a tariff classification ruling on behalf of Crystal Brands Men's Sportswear.

Style 14066 is a man's finely knit, hooded pullover constructed from 100 percent cotton French terry fabric which measures more than nine stitches per two centimeters in the horizontal direction. The garment has a partial front opening with a metal zipper closure; long sleeves with rib knit cuffs; a small zippered pocket in the elbow area of the right sleeve; one patch pocket on the left chest with a buttoned flap; and a rib knit bottom.

The applicable subheading for Style 14066 will be 6110.20.2065, Harmonized Tariff Schedule of the United States (HTS), which provides for sweaters, pullovers, sweatshirts, waistcoats (vests) and similar articles, knitted or crocheted: of cotton: other: other: other: men's or boys'. The duty rate will be 20.7 percent *ad valorem.*

Style 14066 falls within textile category designation 338. Based upon international textile trade agreements, products of Hong Kong are subject to visa requirements.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels),* an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have already been filed, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

CLA–2 CO:R:C:T 956984 CAB
Category: Classification
Tariff No. 6110.20.2075

MR. GREGORY FABRICANT
FARRELL FORWARDING COMPANY, INC.
150–30 132nd Avenue
Jamaica, NY 11434

Re: Request for reconsideration of NYRL 898005.

DEAR MR. FABRICANT:

This is in response to your request for reconsideration on July 25, 1994, of New York Ruling Letter (NYRL) 898005 which was issued June 2, 1994. You are acting on behalf of Crystal Brands Womenswear and Crystal Brands Menswear. A sample was submitted for examination.

Facts:

The garment at issue, which is referred to as Style 14066, is a finely knit hooded pullover that is constructed from 100 percent cotton French terry fabric. The fabric measures more than nine stitches per two centimeters in the horizontal direction. The garment contains a partial front opening with a zippered means of closure, long sleeves with rib knit cuffs, a zippered pocket in the elbow area of the right sleeve, a patch pocket on the left chest with a buttoned flap, and a rib knit bottom. The garment will be imported in sizes small, medium, large, and extra-large. The importer states that the garment is made for women and will be marketed and sold for golf and tennis purposes in country clubs under the Izod Gulf and Tennis Label.

In NYRL 898005, the subject merchandise was classified in subheading 6110.20.2065 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for men's knitted or crocheted cotton pullovers.

You state that the subject garment was incorrectly classified as a men's garment in NYRL 898005 and is properly classifiable as a women's pullover garment in subheading 6110.20.2075, HTSUSA. A representative from Crystal Womenswear confirms that the subject garment is constructed and intended for use by women.

Issue:

What is the proper tariff classification for the garment at issue?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's taken in order.

Heading 6110, HTSUSA, provides for sweaters, pullovers, waistcoats (vests), and similar articles, knitted or crocheted. In this case, the instant article, which is a pullover garment, is specifically provided for in the aforementioned heading.

A question still remains as to whether the garment is intended for use by women or men. Note 8, Chapter 61, HTSUSA, states the following:

> Garments of this chapter designed for left over right closure at the front shall be regarded as men's or boys' garments, and those designed for right over left closure at the front as women's or girls' garments. These provisions do not apply where the cut of the garment clearly indicates that it is designed for one or other of the sexes.
>
> Garments which cannot be identified as either men's or boys' garments or as women's or girls' garments are to be classified in the headings covering women's or girls' garments.

Even though, Style 14066 does not contain an opening that would indicate whether it was intended for use by men or women, it is Customs belief that from the general appearance of the garment that it is constructed and intended for wear by women.

Holding:

Based on the foregoing, Style 14066 is properly classifiable as a women's cotton knit pullover in subheading 6110.20.2075, HTSUSA. The applicable rate of duty is 20.7 percent *ad valorem* and the textile restraint category is 339.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and change, to obtain the most current information available, we suggest that you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories applicable to textile merchandise, you should contact your local Customs office prior to importing the merchandise to determine the current status of any import restraints or requirements.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED MODIFICATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF PHOTOGRAPHIC PAPER

AGENCY: U.S. Customs Service, Department of Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of two types of photographic paper. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before February 24, 1995.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, N.W., (Franklin Court), Washington, DC 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th St., NW., Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Ann Segura Minardi, Food and Chemicals Classification Branch, (202–482–6958).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Moderniza-

tion) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of two types of photographic paper. Comments are invited on the correctness of the proposed ruling.

In New York Ruling Letter (NYRL) 891598, issued on November 9, 1993, by the Area Director of Customs, New York Seaport, receiving paper PS-SG polyethylene coated, and receiving paper PG-SG were classified under subheading 3703.20.3030, HTSUSA, as "Photographic paper, paperboard and textiles, sensitized, unexposed: Other, for color photography (polychrome): Silver halide papers For pictorial use (continuous tone)." NYRL 891598 is set forth as "Attachment A" to this document.

Customs Headquarters is of the opinion that NYRL 891598 erroneously classified these photographic papers in subheading 3703.20.3030, HTSUSA, believing these products to be silver halide paper.

Customs intends to modify NYRL 891598 to reflect proper classification of these items in subheading 3703.20.6000, HTSUSA, which provides for "Photographic paper, paperboard and textiles, sensitized, unexposed: Other, for color photography (polychrome): Other." Before taking this action, consideration will only be given to those written comments which are timely received. Proposed Headquarters Ruling Letter (HRL) 955453 modifying NYRL 891598 is set forth in "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: January 5, 1995.

JOHN G. BLACK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, November 9, 1993.

CLA–2–37:S:N:N7:236 891598
Category: Classification
Tariff No. 3702.44.0060 and 3703.20.3030

MR. NICK SAKAMOTO
NISSHO IWAI AMERICAN CORPORATION
FUJI FILM DEPARTMENT
1211 Avenue of the Americas
New York, NY 10036

Re: The tariff classification of photographic paper and film from Japan.

DEAR MR. SAKAMOTO:

In your letter dated October 13, 1993, you requested a tariff classification ruling. The prospective imports are classified as follows:

Items	*Descriptions (rolls/width in inches)*	*HTS No.*	*Duty (% ad valorem)*
Copy paper AP-NM silver halide	11	3703.20.3030	3.7
Copy paper AP-SG silver halide	11	3703.20.3030	3.7
Print paper AP-NP silver halide	11	3703.20.3030	3.7
OHP film AP-T (pet film) plastic not sensitized	11	3702.44.0060	3.7
Donor paper PS-DS silver halide and pigment	9	3703.20.3030	3.7
Donor paper PS-DH silver halide and pigment	9	3703.20.3030	3.7
Receiving paper PS-SG polyethylene coated	8.5	3703.20.3030	3.7
Receiving film PS-TP plastic film	8.5	3702.44.0060	3.7
Donor paper PG-D silver halide and pigment	9	3703.20.3030	3.7
Receiving paper PG-SG	8.5	3703.20.3030	3.7
Receiving film PG-TP (plastic)	8.5	3702.44.0060	3.7

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

CLA–2 CO:R:C:F 955453 ASM
Category: Classification
Tariff No. 3703.20.6000

MR. NED H. MARSHAK
SHARRETTS, PALEY, CARTER & BLAUVELT, P.C.
67 Broad Street
New York, NY 10004

Re: Modification and request for reconsideration of NYRL 891598 concerning the tariff classification of two types of photographic paper to be imported from Japan.

DEAR MR. MARSHAK:

This letter is in response to your request on behalf of your client, Nissho Iwai American Corporation, for reconsideration of New York Ruling Letter (NYRL) 891598, dated November 9, 1993, regarding the classification of two types of photographic paper: receiving paper PS-SG polyethylene coated, and receiving paper PG-SG.

Facts:

On November 9, 1993, NYRL 891598, classified these products as follows: receiving paper PS-SG polyethylene coated, and receiving paper PG-SG were classified under subheading 3703.20.3030, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), dutiable at 3.7 percent *ad valorem*.

This office received your request for reconsideration of NYRL 891598 on December 1, 1993, where you have asserted that these products (receiving paper PS-SG and receiving paper PG-SG) should both be classified as paper and paper board coated, impregnated, or covered with plastics, in subheading 4811.31.40, HTSUSA, dutiable at 2.6 percent *ad valorem*.

In your petition, you state that the photographic receiving papers PS-SG and PG-SG are not "sensitized," and therefore do not fall within the purview of subheading 3703, HTSUSA. You reference the Explanatory Notes to the Harmonized Tariff Schedule as expressly providing that heading 3703 does not encompass "prepared but unsensitized paper, paperboard, or textiles, e.g., paper coated with albumin, gelatin, barium sulphate, zinc oxide, etc." In addition, you cite four New York Ruling Letters (861051, 861052, 861053, 861312) and Headquarter Ruling Letter (HRL), 085794, in support of the statement that heading 3703, HTSUSA, only applies to "sensitized" paper.

Issue:

What is the proper classification under the HTSUSA for two products, identified as receiving paper PS-SG polyethylene coated, and receiving paper PG-SG?

Law and Analysis:

Classification of merchandise under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI's). As stated in GRI 1, the classification is determined first in accordance with the terms of the headings which must be read in conjunction with the relative section and chapter notes. If GRI 1 fails to classify the goods and if the heading and legal notes do not otherwise require, the remaining GRI's are applied in their appropriate order. The Explanatory Notes to the Harmonized Commodity Description and Coding System (EN's), facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI's.

The products in question, receiving papers PS-SG polyethylene coated and PG-SG are papers coated with a mordant and alkali-releasing agent that have been sensitized for use only with the donor paper. According to the product information sheet for the "FUJI Instant Color Print System" (February 1993), the "alkali releasing agent contained in the receiver sheet permeate the donor paper and reacts with the alkali precursor to produce an alkali." Then, through exposing the donor paper to light, a thermal transfer process, and interfacing the donor and receiving papers, the receiving paper retains the positive dye image from the donor paper and is transformed into the final color print.

Based on the information contained in the product information sheet, it is clear that the subject paper products would meet the definition of "photographic" contained in the Notes

to chapter 37, HTSUSA, which are legally binding in the interpretation of the nomenclature heading terms. Specifically, Note 2 to Chapter 37 defines "photographic" as follows:

> 2. In this chapter the word *"photographic"* relates to a process which permits the formation of visible images directly or indirectly by the action of light or other forms of radiation on sensitive surfaces.

Indeed, the first step in the processing function requires that the donor paper be exposed to light before the subject receiving paper can be finally transformed into the color print. Thus, light has indirectly played a part in the process whereby the sensitive surface of the receiving paper is capable, through the direct application of heat, of producing a visible image.

In order to determine whether or not this paper is "sensitized" within the meaning of Chapter 37, HTSUSA, we refer to the EN's to Chapter 37, which provide guidance and represent the official interpretation of the nomenclature at the international level. The EN for subheading 3703, "photographic paper, paperboard and textiles, sensitized, unexposed," contained at pp. 512–13, specifically provides that this heading cover all sensitized, unexposed photographic paper, flat or rolled, including:

> (1) Paper and textiles for the production of positive photographic prints. These may be used in amateur, professional, X-ray, electro-cardiographic, recording, photocopying, etc., work.

We note that the EN's for subheading 3703 specifically exclude "prepared" paper, e.g., coated with "albumin, gelatin, barium sulphate, zinc oxide, etc." With the exception of barium sulfate, such coatings are not generally used in the photographic process. According to *The Dictionary of Paper* (1980), "gelatin is used as a high-purity alternative for glue in paper coating and sizing" and zinc oxide is used as a filler to impart opacity and color. Albumin is a "simple heat-coagulable water-soluble protein" *(Webster's New Collegiate Dictionary,* 1979).

Based on our review of the ingredients listed for this product, we find no evidence that the receiving papers in question have been coated with albumin, barium sulphate, or zinc oxide. Although we note that the coating for the receiving papers does contain gelatin, it makes-up less than one percent (0.8 percent) of the weight of each sheet. Moreover, it is undisputed that the subject receiving paper is intended for use in the production of positive photographic prints in photocopying work.

The four New York Ruling Letters (861051, 861052, 861053, 861312), can be distinguished from the present case because the papers in the New York Rulings merely consisted of paper which had been coated with polyethylene or plastic facings. At the time of importation into the United States, none of these papers had been chemically treated or sensitized with alkalis or other chemicals which would immediately permit them to be used in the production of photographic prints.

Further, with regard to HRL 085794, we do not believe that the specific reference to the "microcapsules" coating found on the donor *film* would necessarily limit the definition of the"sensitized" developer *paper* which was also classified in the ruling. In fact, HRL 085794 classified the developer paper in subheading 3703.90.6000, HTSUSA, without specific reference as to exactly what chemicals comprised the sensitization of the developer paper. It is also important to note that the subject receiving papers are strikingly similar to the developer papers in HRL 085794, in that neither the developer paper nor the subject receiving paper is directly exposed to light. In addition both the developer paper and the subject receiving paper are intended for the same purpose, *i.e.,* coated with a chemical application so that the sensitive surface of the paper may receive a positive photographic image in the production of photographic prints. Thus, we believe that HRL 085794 provides additional support for classification of the subject product in heading 3703, HTSUSA.

Holding:

In NYRL 891598, both receiving paper PS-SG polyethylene coated and receiving paper PG-SG were classified in subheading 3703.20.3030, HTSUSA, as "Photographic paper, paperboard and textiles, sensitized, unexposed: Other, for color photography (polychrome): Silver halide papers * * *. For pictorial use (continuous tone)" with a duty of 3.7 percent *ad valorem*.

According to the product information contained in this file, we note that there is no silver halide contained in these products. Thus, it is the decision of this office that the receiving papers (PS-SG and PG-SG) are properly classified in subheading 3703.20.6000, HTSUSA, which provides for "Photographic paper, paperboard and textiles, sensitized, unexposed:

Other, for color photography (polychrome): Other" which is dutiable at the general column one rate of 3.1 percent *ad valorem*.

Accordingly, NYRL 891598, dated November 9, 1993, is hereby modified so that it is consistent with this ruling.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED MODIFICATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF TOBRAMYCIN SULFATE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of Tobramycin Sulfate (CAS–79645–27–5). Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before February 24, 1995.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, NW., (Franklin Court), Washington, DC 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th St., NW., Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Ann Segura Minardi, Food and Chemicals Classification Branch, (202–482–6958).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of Tobramycin Sulfate (CAS–79645–27–5). Comments are invited on the correctness of the proposed ruling.

In New York Ruling Letter (NYRL) 866547, issued September 19, 1991, by the Area Director of Customs, New York Seaport, Tobramycin Sulfate was classified under subheading 2941.90.1010, HTSUSA,

which provides for "Natural Aminoglycoside antibiotics." NYRL 866547 is set forth as "Attachment A" to this document.

In NYRL 866547, the product, Tobramycin Sulfate, was erroneously classified as a "Natural Aminoglycoside antibiotic" under subheading 2941.90.1010, HTSUSA. Tobramycin sulfate does not exist naturally. Rather, it is known as a semisynthetic product, *i.e.*, a product manufactured from a natural material (in this case, Tobramycin), but not occurring in nature. The product, however, is properly classified within heading 2941, HTSUSA, because the EN's to heading 2941 make use of the term "chemically modified antibiotics" to describe products such as Tobramycin Sulfate. At this time, Customs has determined that Tobramycin Sulfate is properly classifiable under subheading 2941.90.5000, HTSUSA, which provides for "Other" antibiotics.

Customs intends to modify NYRL 866547 to reflect proper classification of this item in subheading 2941.90.5000, HTSUSA, which provides for "Antibiotics: Other: Other: Other." Proposed Headquarters Ruling Letter (HRL) 956674 modifying NYRL 866547 is set forth in "Attachment B" to this document. Before taking this action, consideration will be given to any written comments timely received.

Claims for detrimental reliance under section 177.9, Customs regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: January 5, 1995.

JOHN G. BLACK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, September 19, 1991.
CLA–2–29:S:N:N1:238 866547
Category: Classification
Tariff No. 2941.90.1010

MS. DEE KOERKEL
SCHWEIZERHALL, INC.
10 Corporate Place South
Piscataway, NJ 08854

Re: The tariff classification of tobramycin base USP 22 and tobramycin sulphate USP 22 in bulk form from China.

DEAR MS. KOERKEL:

In your letter dated July 15, 1991 you requested a tariff classification ruling.

The Tobramycin Base and Sulfate USP 22 are aminoglycosides in bulk form produced by microorganisms and used as antibiotics.

The applicable subheading for the Tobramycin Base and Sulfate will be 2941.90.1010, Harmonized Tariff Schedule of the United States (HTS), which provides for other natural aminoglycoside antibiotics. The rate of duty will be 1.8 percent *ad valorem*.

This merchandise may be subject to the regulations of the Food and Drug Administration. You may contact them at 5600 Fishers Lane, Rockville, Maryland 20857, telephone number (202) 443–3380.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy. this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

CLA–2 CO:R:C:F 956674 ASM
Category: Classification
Tariff No. 2941.90.5000

MS. DEE KOERKEL
SCHWEIZERHALL, INC.
10 Corporate Place South
Piscataway, NJ 08854

Re: Modification of New York Ruling Letter 866547 concerning the tariff classification of Tobramycin Sulfate (CAS–79645–27–5).

DEAR MS. KOERKEL:

This letter is to advise you that Customs has modified New York Ruling Letter (NYRL) 866547 dated September 19, 1991, regarding the classification of Tobramycin Sulfate (CAS–79645–27–5).

Facts:

On September 19, 1991, NYRL 866547 classified this product under subheading 2941.90.1010, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for "Antibiotics: Other: Natural: Aminoglycoside antibiotics" with a rate of duty at 1.8 percent *ad valorem*.

Issue:

What is the proper classification under the HTSUSA for Tobramycin Sulfate?

Law and Analysis:

Classification of merchandise under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI's). As stated in GRI 1, the classification is determined first in accordance with the terms of the headings which must be read in conjunction with the relative section and chapter notes. If GRI 1 fails to classify the goods and if the headings and legal notes do not otherwise require, the remaining GRI's are applied in their appropriate order. The Explanatory Notes to the Harmonized Commodity Description and Coding System (EN's), facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI's.

In NYRL 866547, the product, Tobramycin Sulfate, was erroneously classified as a "Natural Aminoglycoside antibiotic" under subheading 2941.90.1010, HTSUSA. Tobramycin sulfate does not exist naturally. Rather, it is known as a semisynthetic product, *i.e.*, a product manufactured from a natural material (in this case, Tobramycin), but not occurring in nature. The product, however, is properly classified within heading 2941, HTSUSA, because the EN's to heading 2941 make use of the term "chemically modified antibiotics" to describe products such as Tobramycin Sulfate. Thus, Tobramycin Sulfate is properly

classifiable under subheading 2941.90.5000, HTSUSA, which provides for "Other" antibiotics.

Holding:

The product, Tobramycin Sulfate (CAS–79645–27–5), is classifiable in subheading 2941.90.5000, HTSUSA, which provides for "Antibiotics: Other: Other: Other," dutiable at the general one column rate of duty, 3.7 percent *ad valorem*.

Accordingly, NYRL 866547, dated September 19, 1991, is hereby modified so that it is consistent with this ruling.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED MODIFICATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF SAMARIUM OXIDE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of Samarium Oxide (CAS–12060–58–1). Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before February 24, 1995.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, NW., (Franklin Court), Washington, DC 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th St., NW., Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Ann Segura Minardi, Food and Chemicals Classification Branch, (202–482–6958).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of Samarium Oxide (CAS–12060–58–1). Comments are invited on the correctness of the proposed ruling.

In New York Ruling Letter (NYRL) 852408, issued June 1, 1990, by the Area Director of Customs, New York Seaport, Samarium Oxide was classified under subheading 2846.10.0000, HTSUSA, which provides for Cerium compounds. NYRL 852408 is set forth as "Attachment A" to this document.

Customs Headquarters is of the opinion that NYRL 852408 erroneously classified Samarium Oxide in subheading 2846.10.0000, HTSUSA. At this time, Customs has determined that Samarium Oxide is properly classified within subheading 2846.90.5000, HTSUSA.

Customs intends to modify NYRL 852408 to reflect proper classification of this item in subheading 2846.90.5000, HTSUSA, which provides for "Compounds, inorganic or organic, of rare-earth metals, of yttrium or of scandium, or of mixtures of these metals: Other: Other." Headquarters Ruling Letter 956557 modifying NYRL 852408 is set forth in "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: January 5, 1995.

JOHN G. BLACK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, June 1, 1990.

CLA–2–28:S:N:N1:235 852408
Category: Classification
Tariff No. 2846.10.0000 and 2846.90.5000

MR. PHILIP P. CHOBAN, PRESIDENT
MPV LANTHANIDES, INC.
24371 Lorain Road #202
Olmsted, OH 44070

Re: The tariff classification of samarium oxide, europium oxide, cerium oxide, lanthanum oxide and gadalinum oxide from the People's Republic of China.

DEAR MR. CHOBAN:

In your letter dated May 9, 1990, you requested a tariff classification ruling.

The applicable subheading for samarium oxide and cerium oxide will be 2846.10.000, Harmonized Tariff Schedule of the United States (HTS), which provides for cerium compounds. The rate of duty will be 7.2 percent *ad valorem*.

The applicable subheading for europium oxide, lanthanum oxide and gadolinium oxide will be 2846.90.5000 which provides for rare-earth compounds. The rate of duty will be 3.7 percent *ad valorem*.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

CLA–2 CO:R:C:F 956557 ASM
Category: Classification
Tariff No. 2846.90.50000

MR. PHILIP P. CHOBAN
PRESIDENT
LANTHANIDES, INC.
24371 Lorain Rd. , #202
North Olmstead, OH 44070

Re: Modification of New York Ruling Letter 852408 concerning the tariff classification of Samarium Oxide (CAS–12060–58–1) imported from the Peoples Republic of China.

DEAR MR. CHOBAN:

This letter is to advise you that Customs has modified New York Ruling Letter (NYRL) 852408, dated June 1, 1990, regarding the classification of Samarium Oxide.

Facts:

On June 1, 1990, NYRL 852408 classified this product under subheading 2946.10.0000, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for cerium compounds, with a rate of duty at 7.2 percent *ad valorem*.

Issue:

What is the proper classification under the HTSUSA for Samarium Oxide?

Law and Analysis:

Classification of merchandise under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI's). As stated in GRI 1, the classification is determined first in accordance with the terms of the headings which must be read in conjunction with the relative section and chapter notes. If GRI 1 fails to classify the goods and if the heading and legal notes do not otherwise require, the remaining GRI's are applied in their appropriate order. The Explanatory Notes to the Harmonized Commodity Description and Coding System (EN's), facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI's.

In NYRL 852408, the product, Samarium Oxide, was erroneously classified as a cerium compound under subheading 2846.10.0000, HTSUSA. The correct classification for Samarium Oxide is under subheading 2846.90.5000, HTSUSA.

Holding:

The product, Samarium Oxide (CAS–12060–58–1), is classifiable in subheading 2846.90.5000, HTSUSA, which provides for "Compounds, inorganic or organic, of rare-earth metals, of yttrium or of scandium, or of mixtures of these metals: Other: Other," dutiable at the general one column rate of duty, 3.7 percent *ad valorem*.

Accordingly, NYRL 852408, dated June 1, 1990, is hereby modified so that it is consistent with this ruling.

JOHN DURANT,
Director,
Commercial Rulings Division.

PUBLIC MEETING IN WASHINGTON ON CUSTOMS AUTOMATED EXPORT SYSTEM

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of meeting.

SUMMARY: This document provides notice that Customs is going to hold a public meeting in Washington, DC to update the export trade community on the current developments of the Automated Export System.

DATE: The meeting will be held on Thursday, February 2, 1995, from 9:00 a.m. to 1:00 p.m.

ADDRESS: The meeting will be held in Washington, DC at the U.S. Department of Commerce Auditorium at 14th Street and Constitution Avenue, N.W.

FOR FURTHER INFORMATION CONTACT: Lorna Finley, Automated Export System Development Team (202) 927–0280. If interested in attending meeting, RSVP by FAX to Ms. Finley at (202) 927–0742.

SUPPLEMENTARY INFORMATION:

Customs will be holding a public meeting in Washington, DC at the Department of Commerce Auditorium at 14th Street and Constitution Avenue, N.W. on Thursday, February 2, 1995, from 9:00 a.m. to 1 p.m. to update the export trade community on the current developments of the Automated Export System (AES). At this meeting the AES Development Team and the Trade Resource Group will discuss the following topics:

1. Status of AES Development;
2. Data Elements—Prefiling Requirements;
3. Data Communications—Technical Issues;
4. Planned Implementation by July 1995; and
5. Bureau of Export Administration and Office of Defense Trade Controls Interface.

All of the public is invited to attend the meeting. If you plan to attend, please RSVP by FAX to Lorna Finley at 202–927–0742.

Dated: January 11, 1995.

SHARON A. MAZUR,
Director,
Automated Export System Development Team.

[Published in the Federal Register, January 18, 1995 (60 FR 3698)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 95–1)

NTN BEARING CORP. OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORP., AND NTN CORP., PLAINTIFFS *v.* UNITED STATES, U.S. DEPARTMENT OF COMMERCE, AND RONALD H. BROWN, SECRETARY OF COMMERCE, DEFENDANTS, AND TIMKEN CO., DEFENDANT-INTERVENOR

Court No. 92–04–00257

Plaintiffs move pursuant to Rule 56.2 of the Rules of this Court for judgment upon the agency record. plaintiffs specifically contest the Department of Commerce, International Trade Administration's ("ITA") determination (1) not to employ a 10% "cap" on any single physical criterion in the "sum of the deviations" model match methodology; (2) to split the price of sets sold in the home market for purposes of determining foreign market value of cups and cones sold individually in the United States; (3) to match U.S. sales with home market sales at different levels of trade; (4) not to make a level of trade adjustment reflecting the full difference in price levels between the two levels of trade; (5) to use a three-month test to determine whether sales were made below cost over an "extended period of time"; (6) to reject the reported interest rate expense taking into account compensating deposits; (7) to use sales made in insufficient quantities in determining foreign market value; (8) to compare bearings of different design types; and (9) to have committed clerical errors.

Held: Plaintiffs' motion for judgment upon the agency record is granted in part and is remanded to the ITA for (1) application of a 10% limit upon deviation from the five-criterion model match methodology used in the final results; (2) explanation of its reasons for not accepting plaintiffs' method for calculation of credit expenses and not using plaintiffs' nominal interest rate; (3) correction of any error in the deduction of discounts from home market price for purposes of the cost of production test; and (4) correction of the computer program so that all such or similar home market sales are identified. All other issues are affirmed.

[Plaintiffs' motion is granted in part and denied in part; this case is remanded to the ITA.]

(Dated January 3, 1995)

Barnes, Richardson & Colburn (Robert E. Burke, Donald J. Unger and *Jesse M. Gerson)* for plaintiffs.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Velta A. Melnbrencis);* of counsel: *Linda S. Chang* and *Joan L. MacKenzie,* Attorney-Advisors, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., William A. Fennell, Julie Chasen Ross, Edith A. Eisner and *Christopher J. Callahan)* for defendant-intervenor.

OPINION

TSOUCALAS, *Judge:* Plaintiffs, NTN Bearing Corporation of America, American NTN Bearing Mfg. Corporation and NTN Corporation

("NTN"), commenced this action challenging certain aspects of the Department of Commerce, International Trade Administration's ("ITA" or "Commerce") final results of its third administrative review of certain tapered roller bearings ("TRBs") from Japan. *Tapered Roller Bearings, and Parts Thereof, Finished and Unfinished, From Japan; Final Results of Antidumping Duty Administrative Review,* 57 Fed. Reg. 4,960 (Feb. 11, 1992), as amended by *Tapered Roller Bearings, and Parts Thereof, Finished and Unfinished, From Japan; Amendment to Final Results of Antidumping Duty Administrative Review,* 57 Fed. Reg. 9,104 (Mar. 16, 1992), (collectively, *"Final Results")*

Specifically, plaintiffs claim that the ITA erred in (1) its refusal to employ a 10% maximum deviation limit on any single physical criterion employed by the ITA in their "sum of the deviation" methodology, which is used to determine similar merchandise sold in the home market; (2) basing foreign market value ("FMV") of TRB cups and cones sold in the United States upon prices created by splitting the price of sets sold in the home market; (3) matching U.S. sales with home market sales at different levels of trade when no sales of such or similar merchandise at the same level of trade were found in the home market; (4) its refusal to make a level of trade adjustment which would reflect the full differences in price levels between different levels of trade; (5) its refusal to use a period of six months, which represents a majority of the period of review, for purposes of the "extended period of time test" employed by the ITA as part of its test to exclude home market sales made at prices below cost of production ("COP"); (6) its refusal to use the interest rate reported by NTN, which rate took compensating deposits into account, for purposes of calculating credit expenses in Japan; (7) its use of certain home market sales to determine foreign market value which were inadequate to form a basis of foreign market value pursuant to 19 U.S.C. § 1677b(b) (1988); (8) its comparison of bearings of different design types; and (9) its commission of two clerical errors: namely, its failure to deduct discounts from home market price for purposes of the cost of production test and its failure to identify all possible identical or similar models sold in the home market. *Plaintiffs' Motion and Memorandum in Support Thereof for Judgment on the Agency Record ("Plaintiffs' Brief")* at 13–64.

BACKGROUND

In 1976, the Treasury published a dumping finding, T.D. 76–227, with respect to TRBs from Japan. *Tapered Roller Bearings and Certain Components Thereof From Japan,* 41 Fed. Reg. 34,974 (Aug. 18, 1976). In 1981, Commerce clarified T.D. 76–227 to cover only TRBs four inches or less in outside diameter, and certain TRB components. *Tapered Roller Bearings and Certain Components Thereof From Japan; Clarification of Scope of Antidumping Finding,* 46 Fed. Reg. 40,550 (Aug. 10, 1981). In 1982, Commerce revoked T.D. 76–227 with respect to TRBs manufactured by NTN. *Defendants' Memorandum in Partial Opposition to*

Plaintiffs' Motion for Judgment Upon the Agency Record ("Defendants' Brief") at 4.

In 1987, Commerce published another antidumping duty order on TRBs from Japan. *Antidumping Duty Order; Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan,* 52 Fed. Reg. 37,352 (Oct. 6, 1987). This order included all TRBs and parts thereof manufactured by NTN and all TRBs over four inches in outside diameter and parts thereof manufactured by other manufacturers.

In August 1991, Commerce published its final results of its first administrative review of TRBs covered by the 1987 order. *Tapered Roller Bearings, Finished and Unfinished, and Parts Thereof, From Japan; Final Results of Antidumping Duty Administrative Review,* 56 Fed. Reg. 41,508 (Aug. 21, 1991). These final results have been contested by Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. ("Koyo") (Court No. 91–09–00704), NTN (Court No. 91–09–00695), and The Timken Company ("Timken") (Court No. 91–09–00697).

In February 1992, Commerce published the final results of its second administrative review of TRBs covered by the 1987 order. *Tapered Roller Bearings, Finished and Unfinished, and Parts Thereof, From Japan; Final Results of Antidumping Duty Administrative Review,* 57 Fed. Reg. 4,951 (Feb. 11, 1992), covering the period October 1, 1988 through September 30, 1989. These final results have been contested by Timken (Court No. 92–03–00162), NTN (Court No. 92–03–00167), Koyo (Court No. 92–03–00169), and NSK (Court No. 92–03–00158).

In February of 1992, Commerce published the final results of the third administrative review of TRBs covered by the 1987 order, covering the period October 1, 1989 through September 30, 1990. *Tapered Roller Bearings, and Parts Thereof, Finished and Unfinished, From Japan; Final Results of Antidumping Duty Administrative Review,* 57 Fed. Reg. 4,960 (Feb. 11, 1992). These final results have been contested by Koyo (Court No. 92–03–00156), Timken (Court No. 92–03–00161) and, in the present case, NTN (Court No. 92–03–00168).

In March of 1992, Commerce published an amendment to the final results for the third administrative review of TRBs covered by the 1987 order. *Tapered Roller Bearings, and Parts Thereof, Finished and Unfinished, From Japan; Amendment to Final Results of Antidumping Duty Administrative Review,* 57 Fed. Reg. 9,104 (Mar. 16, 1992). These amended final results have been contested by Timken (Court No. 92–03–00161) and NTN (Court Nos. 92–03–00168 and, in the present case, 92–04–00257).

DISCUSSION

This Court must uphold final results of an ITA administrative review unless the ITA determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is defined as "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB,* 305 U.S. 197: 229

(1938); *Alhambra Foundry Co. v. United States,* 12 CIT 343, 345, 685 F. Supp. 1252, 1255 (1988). It is "not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *Timken Co. v. United States,* 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd,* 894 F.2d 385 (Fed Cir. 1990).

1. *Model Match Methodology:*

NTN argues that, for purposes of calculating dumping margins, Commerce compared dissimilar merchandise because it did not impose a ten percent limit upon deviation from the five-criteria model match methodology for selecting the most similar home market TRB model. It is NTN's position that it is unlawful and unreasonable to compare, on any basis, bearings that are radically different as to any one of the five physical criteria, and not to have placed an individual cap on each of the five criteria used. Thus, the 20% cost cap used does not ensure the physical similarity of bearings or comparable commercial value. *Plaintiffs' Brief* at 13–21.

The ITA asserts that when identical merchandise is not available in the home market for comparison with the merchandise sold to the United States, Commerce must select "similar" comparison merchandise based upon the physical characteristics of the merchandise being compared. *Defendants' Brief* at 9–10; 19 U.S.C. § 1677(16) (1988).[1] Commerce has been granted broad discretion to devise a methodology for determining what constitutes "similar" merchandise. *See Smith-Corona Group v. United States,* 713 F.2d 1568, 1571 (Fed. Cir. 1983), *cert. denied,* 465 U.S. 1022 (1984).

In this review, the ITA compared home market sales of TRBs to U.S. sales according to five physical characteristics criteria, determining a "similar" bearing by computing a single factor, the "sum of the deviations," which is based on differences between the U.S. and home market bearings. With respect to each, ITA compared the variable cost of the "similar" home market bearing to that of the U.S. model. If the difference was greater than 20%, the ITA did not consider the pair to be "similar." If not, this cost difference was used to calculate an adjustment pursuant to 19 C.F.R. § 353.57(b) (1992). Commerce argues its actions are in accordance with law and well within the discretion it is granted as

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[1] 19 U.S.C. § 1677(16) (1988) provides:

The term "such or similar merchandise" means merchandise in the first of the following categories in respect of which a determination for the purpose of part II of this subtitle can be satisfactorily made:

(A) The merchandise which is the subject of an investigation and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.
(B) Merchandise—
(i) produced in the same country and by the same person as the merchandise which is the subject of the investigation,
(ii) like that merchandise in component material or materials and in the purposes for which used, and
(iii) approximately equal in commercial value to that merchandise.
(C) Merchandise—
(i) produced in the same country and by the same person and of the same general class or kind as the merchandise which is the subject of the investigation,
(ii) like that merchandise in the purposes for which used, and
(iii) which the administering authority determines may reasonably be compared with that merchandise.

the merchandise selected had the same physical characteristics and was approximately equal in commercial value. *Defendants' Brief* at 10–26. Timken echoes the arguments made by Commerce. *The Timken Company's Response to Plaintiffs' Rule 56.2 Motion for Judgment on the Agency Record ("Timken's Brief")* at 15–24.

An accurate investigation requires that the merchandise used in the comparison be as similar as possible. Furthermore, as plaintiffs correctly maintain, there is a statutory preference for comparison of most similar, if not identical merchandise for the purpose of FMV calculations. 19 U.S.C. § 1677(16); *see Timken Co. v. United States ("Timken I")*, 10 CIT 86, 96, 630 F. Supp. 1327, 1336 (1986). Undoubtedly, the ITA's fundamental objective in an antidumping investigation is to compare the United States price of imported merchandise with the value of "such or similar merchandise" sold in the foreign market. *Timken I*, 10 CIT at 95, 630 F. Supp. at 1336.

This Court recently ruled on this issue in *Koyo Seiko Co. v. United States*, 17 CIT ____, ____, 834 F. Supp. 431, 434–35 (1993), stating that Commerce's methodology "must be used in conjunction with the ten percent cap to limit the permissible deviation of the criteria used to make TRB models." *Id.* at ____, 834 F. Supp. at 435. The use of a ten percent cap avoids comparisons between products which differ so dramatically that they simply cannot be considered commercially similar. *Id.* More recently, this Court adhered to this decision in *NTN Bearing Corp. of America, American NTN Bearing Mfg. Corp. and NTN Corp. v. United States*, 17 CIT ____, ____, 835 F. Supp. 646, 648 (1993), *appeal after remand, dismissed*, 18 CIT ___, 834 F. Supp. 737 (1994), and in *NTN Bearing Corp. of America, American NTN Bearing Mfg. Corp. and NTN Corp. v. United States*, 18 CIT ____, 858 F. Supp. 215 (1994).

The Court adheres to its earlier decisions and its recent decision in *NTN Bearing Corp. of America, American NTN Bearing Mfg. Corp. and NTN Corp. v. United States*, 18 CIT ___, Slip Op. 94–200 (December 29, 1994), and this case is therefore remanded to Commerce to impose a 10% limit upon deviation from the five-criterion model match methodology used in the final results for selecting the most similar home market TRB model.

2. *Splitting TRB Sets to Calculate FMV:*

NTN argues that splitting of TRB sets into cups and cones is contrary to statute in that it results in the use of fictitious sales and fictitious markets (in order to create fictitious prices) for purposes of establishing foreign market value. NTN further argues that Commerce's artificial price methodology frustrates the purpose of the antidumping statute because it divests the exporter of control over its home market prices. Thus, NTN argues it may be subjected to arbitrary assessments of antidumping duties because it has no control over the relative prices of its merchandise as determined by Commerce. *Plaintiffs' Brief* at 21–34.

Commerce maintains that the set-splitting methodology is used to apportion the price of a set to its component parts based on a ratio of the

COP of each part to the COP of the set. Commerce asserts that they do not create a fictitious sale: they only allot portions of the price of actual sales to their component parts. *Defendants' Brief* at 29–34. Timken supports Commerce's position. *Timken's Brief* at 29–38.

NTN states that the establishment of foreign market value by the agency is subject to clearly defined guidelines in the statute: "In the ascertainment of foreign market value for the purposes of this subtitle no pretended sale or offer for sale, and no sale or offer for sale intended to establish a fictitious market, shall be taken into account." 19 U.S.C. § 1677b(a)(1) (1988); *Plaintiffs' Brief* at 21–22.

NTN contends that 19 U.S.C. § 1677b(a)(1) and 19 C.F.R. § 353.43(b) (1992) do not permit the creation of fictitious, "pretended" sales for purposes of calculating foreign market value. *Plaintiffs' Brief* at 21–23.

NTN's argument has been previously rejected by this Court in *Timken Co. v. United States ("Timken II")*, 11 CIT 786, 794, 673 F. Supp. 495, 504 (1987); *see also NTN Bearing Corp. of America v. United States*, 14 CIT 623, 639–40, 747 F. Supp. 726, 740 (1990). NTN states that it believes that the decision of the Court in *Timken II* as to set splitting is erroneous because the Court failed to consider the statutory scheme for the determination of whether merchandise is being sold in the U.S. at less than fair value. *Plaintiffs' Brief* at 32. They argue that the statutory scheme provides that fair value shall be determined in the first instance by reference to home market prices for "such or similar" merchandise. 19 U.S.C. § 1677b(a)(1)(A). If there are not sufficient sales of such or similar merchandise in the home market, the statute directs the administering authority to look to third country prices or constructed value. 19 U.S.C. § 1677b(a)(1)(B) and (2). NTN further states that the decision of the Court in *Timken II* also undermines the fundamental purpose of the anti-dumping duty law by subjecting importers to arbitrary assessments of antidumping duties. *Id.* at 32.

This Court, having rendered a decision in *NTN Bearing Corp.*, 18 CIT ____, Slip Op. 94–200, on similar arguments, adheres to its decision in that case for the reasons set out therein. Therefore, this Court affirms the ITA's action on this issue.

3. *Sales Across Different Levels of Trade:*

NTN argues that Commerce erred in comparing U.S. TRB models with home market TRB models sold at different levels of trade and that the Court should reject Commerce's methodology. *Plaintiffs' Brief* at 34–39. For the reasons set out below, NTN's argument is without merit.

19 U.S.C. § 1675(a) (1988) requires Commerce to calculate the difference between foreign market value and United States price ("USP") of the imported merchandise. Before calculating FMV, Commerce must first identify, for each U.S. sale, a comparison home market sale. If identical merchandise as defined in 19 U.S.C. § 1677(16) is not available, Commerce must then proceed to select similar merchandise as defined in subsections (B) or (C) of 19 U.S.C. § 1677(16).

During the review, for purposes of comparing U.S. TRB models with home market TRB models, Commerce first searched for such or similar merchandise at the same level of trade and then at different levels of trade, making adjustments for differences using NTN's indirect selling expenses. *Defendants' Brief* at 34.

This Court finds Commerce's comparison of sales across different levels of trade was in accordance with law and this issue is affirmed as to that comparison methodology. *See NTN Bearing Corp.*, 18 CIT ____, Slip Op. 94–200.

4. *Level of Trade Adjustment:*

NTN alternatively claims that, if Commerce is to cross trade levels when selecting such or similar merchandise, a level of trade adjustment based on indirect selling expenses alone does not reflect the substantial price differences between the two levels of trade and, therefore, any adjustments for level of trade differences should not be limited to only differences in selling expenses, but also account for the full differences in price levels. *Plaintiffs' Brief* at 39–50.

NTN argues such an adjustment should be made pursuant to 19 C.F.R. § 353.58 (1992), which states in relevant part:

> The Secretary normally will calculate foreign market value and United States price based on sales at the same commercial level of trade. If sales at the same commercial level of trade are insufficient in number to permit an adequate comparison, the Secretary will calculate foreign market value based on sales of such or similar merchandise at the most comparable commercial level of trade as sales of the merchandise and *make appropriate adjustments for differences affecting price comparability.*

(Emphasis added.)

Accordingly, NTN now asks the Court to remand this case to Commerce for a level of trade adjustment accounting for differences in indirect selling expenses as well as "price comparability" and for an explanation as to why NTN has not adequately demonstrated that the difference in price among the levels of trade is due to the differences in levels of trade. *Plaintiffs' Brief* at 39–42.

In the present case, however, Commerce explained to the satisfaction of this Court its rejection of NTN's claim for a level of trade adjustment based on price:

> NTN's argument that a level of trade adjustment should be based on the differences in price levels does not address the issue of whether the difference in price is solely due to the difference in level of trade, or whether other factors affect price. NTN submitted quantifiable evidence which reflects the difference in selling expenses, but because we have already made adjustments for the direct selling expenses, we have based our adjustment on indirect selling expenses only in order to avoid double counting the direct selling expenses [citation omitted].

Final Results, 57 Fed. Reg. at 4,966.

Thus, Commerce concluded that the only quantifiable information submitted by plaintiffs that accounts for the difference in price across levels of trade is selling expenses and, since direct selling expenses were already deducted, Commerce found that a deduction of indirect selling expenses was the only basis for a level of trade adjustment. *Id.; see also NTN Bearing Corp.*, 17 CIT at ___, 835 F. Supp. at 650. The Court agrees. *See NTN Bearing Corp.*, 18 CIT ___, Slip Op. 94–200. Therefore, this Court affirms the ITA's action on this issue.

5. *Extended Period of Time Test:*

Commerce used a period of three months to define "an extended period of time" for purposes of testing whether to include certain below cost sales in its calculation of FMV. It is the contention of NTN that three months during a period of review did not represent "an extended period of time" for sales made below the cost of production, but that an extended period must be defined as a majority of the period, or in excess of 50% of the period. *Plaintiffs' Brief* at 51–52.

Commerce disagrees, arguing that 19 U.S.C. § 1677b(b) is designed to ensure that below-cost sales are disregarded only if they are seasonal or short-term sales. Commerce points out that TRBs are not perishable or subject to seasonal fluctuations and do not undergo frequent generational changes. *Defendants' Brief* at 40–43. Timken agrees with the arguments presented by Commerce. *Timken's Brief* at 55–56.

Commerce defined an "extended period of time" as three months and explains:

> We used a period of three months to define extended period of time since three months is commonly used to measure corporate, financial, and economic performance. The use of three months to measure frequency of below-cost sales shows that sales below COP are not random, accidental, or sporadic. This time measurement also ensures that the Department uses home market prices that are above COP in its price to price comparisons in all but random or sporadic situations.

Final Results, 57 Fed. Reg. at 4,965.

NTN argues that the "extended period of time" should be over half of the 12-month review period or six months. Its entire argument is based on the dictionary definition of extended time. *See Plaintiffs' Brief* at 51–52.

Congress did not provide a specified time period in section 1677b(b) for determining whether sales below cost were made over an extended period of time and therefore has left it up to Commerce to determine what constitutes an extended period of time within the context of a particular proceeding. If Commerce's interpretation is reasonable, it must be sustained. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–44 (1984).

NTN produced no information indicating that below-cost sales are a normal and expected characteristic of the trade in TRBs. Thus, Commerce's definition of the term "extended period of time" is supported by

substantial evidence and in accordance with law. Further, this Court has previously determined, under similar circumstances, that three months does constitute "an extended period of time." *See NTN Bearing Corp.*, 18 CIT ____, Slip op. 94–200; *see NTN Bearing Corp. of America, American NTN Bearing Mfg. Corp. and NTN Corp. v. United States*, 18 CIT ___, 858 F. Supp. 215 (1994). Therefore, this issue is hereby affirmed.

6. *Calculation of NTN's Credit Costs:*

NTN argues that, in calculating credit costs, Commerce should take into account any compensating balances that NTN had deposited. NTN asserts it is only fair that Commerce consider these funds as part of the interest expense because NTN must keep the funds tied up on deposit for purposes of a loan. NTN asserts that this expense is based on NTN's audited books and records and that, therefore, there is no basis for the ITA to reject it. Alternatively, NTN urges that, if the ITA disallows NTN's claim as to compensating deposits, the ITA should use NTN's nominal interest rate. *Plaintiffs' Brief* at 52–56.

Timken argues that NTN's interest rate for calculating credit costs should be recalculated without any adjustment for compensating deposits because NTN did not demonstrate that the deposits were required by its bankers with respect to particular commercial loans or were in any way linked to its loans. *Timken's Brief* at 38–40. In the review, Commerce agreed with Timken, stating:

> We agree with Timken that there is inadequate justification to accept NTN's credit cost calculation based on compensating deposits. In our preliminary results, we recalculated NTN's credit costs based on the firm's net interest expense (disregarding compensating deposits) as most representative of the firm's internal cost of funds.

Final Results, 57 Fed. Reg. at 4,968.

Commerce states that, although NTN has not demonstrated that Commerce's formula for calculating credit expenses is in any way unreasonable, the matter should be remanded so that Commerce can explain its methodology. *Defendants' Brief* at 43–44. Because in the final results Commerce did not adequately explain the manner in which it calculated the deposit rate and the reasons for not using NTN's nominal interest rate, this issue is remanded to Commerce so that it can explain the methodology that it employed in calculating credit costs. *See NTN Bearing Corp.*, 18 CIT ____, Slip Op. 94–200.

7. *Sales Made in Insufficient Quantities:*

NTN argues that Commerce, after properly disregarding below-cost home market sales, improperly used sales in insufficient quantities in determining foreign market value contrary to 19 U.S.C. § 1677b(b). NTN states that Commerce never determined that the remaining sales were adequate and that Commerce's printouts which were released to NTN did not identify the quantity of each home market model used to determine FMV. Consequently, NTN asserts it cannot provide examples

of this alleged error as it has for a previous review. NTN requests a remand ordering Commerce to release the information. *Plaintiffs' Brief* at 56–57.

Commerce asserts that, as NTN has not demonstrated that insufficient quantities of TRB models remained after Commerce disregarded below-cost sales, NTN's complaint should be rejected. Commerce contends it should not be required to supplement the administrative record with currently non-existing compilations. Commerce states that, although it generally uses the quantity of units sold to calculate FMV, it does not normally examine the quantity of units sold for each model in calculating FMV. *Defendants' Brief* at 44–46. Timken agrees with the ITA's position and adds that there is no requirement in the statute that the ITA use a particular volume of home market sales in calculating FMV. *Timken's Brief* at 57–58.

NTN has not demonstrated that Commerce, in fact, used insufficient quantities of home market sales in determining FMV, and has not cited to any record reference which would indicate that it requested Commerce to create the information which it now seeks. Therefore, this Court finds that Commerce acted in accordance with law and is supported by substantial evidence. *See NTN Bearing Corp.*, 18 CIT ____, Slip Op. 94–200. This issue is hereby affirmed.

8. *Bearing Design Type:*

NTN contests Commerce's comparison of bearings of different design types. NTN claims that Commerce erroneously compared normal grade bearings with high precision grade bearings. NTN asserts that neither Commerce's model match methodology, the sum of deviations methodology, nor Commerce's cost test, recognize important distinctions between normal grade and high precision grade bearings, which resulted in the comparison of highly dissimilar merchandise. *Plaintiffs' Brief* at 58–60.

At the administrative level, Commerce disagreed with NTN, explaining its model match methodology:

> Throughout the extended history of the two TRB proceedings, the Department requested input by interested parties and evolved the use of these five physical criteria to identify and compare models sold in the U.S. and the home market. We are aware that these five characteristics are not substitutes for the technical specifications of the products under review, since TRB product manual list more than 25 statistics for each bearing. However, we have determined that, for the purposes of selecting similar merchandise in a dumping calculation, these five criteria are the pertinent data to be collected and analyzed.

Final Results, 57 Fed. Reg. at 4,964.

The Court finds that Commerce acted reasonably in comparing normal grade bearings with precision grade bearings. *See NTN Bearing Corp.*, 18 CIT ____, Slip Op. 94–200. This issue is hereby affirmed.

9. *Clerical Errors:*

NTN alleges Commerce committed two clerical errors. First, NTN notes that, although Commerce has deducted discounts from home market price for purposes of the cost of production test in other antidumping proceedings and had confirmed at the disclosure conference that it had done so in this review, the computer program in this case indicates that no discounts were actually deducted. NTN believes this was a clerical error as the practice of deducting home market discounts for the purpose of the COP test is consistent with past agency practice and with law. *Plaintiffs' Brief* at 61–62. Commerce disputes that a clerical error occurred, but admits to a discrepancy between its analysis memorandum and the computer program instructions. *Defendants' Brief* at 46. Timken asserts that a remand is not required and disputes the manner in which NTN accounts for discounts. *Timken's Brief* at 60–61. In light of the above, this matter is hereby remanded to Commerce for correction of this discrepancy and of any resulting error in the deduction of discounts from home market price for purposes of the cost of production test. *See NTN Bearing Corp.*, 18 CIT ____, Slip Op. 94–200.

Second, NTN requests a remand so that Commerce can correct a computer programming error which resulted in a failure to identify all possible identical or similar models sold in the home market. *Plaintiffs' Brief* at 62–63. Commerce agrees that a computer programming error occurred. *Defendants' Brief* at 46. Therefore, this matter is remanded for correction of the computer program so that all such or similar home market TRBs are identified. *See NTN Bearing Corp.*, 18 CIT ____, Slip Op. 94–200.

CONCLUSION

For the foregoing reasons, this case is remanded to Commerce for (1) application of a 10% limit upon deviation from the five-criterion model match methodology used in the final results; (2) explanation of its reasons for not accepting plaintiffs' method for calculation of credit expenses and not using plaintiffs' nominal interest rate; (3) correction of any error in the deduction of discounts from home market price for purposes of the cost of production test; and (4) correction of the computer program so that all such or similar home market sales are identified. Commerce's determination is affirmed in all other respects. Remand results are due within ninety (90) days of the date this opinion is entered. Any comments or responses are due within thirty (30) days thereafter. Any rebuttal comments are due within fifteen (15) days of the date responses or comments are due.

(Slip Op. 95–2)

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 92–03–00137

[ITA determination remanded for VAT adjustment.]

(Dated January 6, 1995)

Collier, Shannon, Rill & Scott (Paul D. Cullen, Jeffrey S. Beckington, Mary T. Staley) for plaintiffs International Brotherhood of Electrical Workers; International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers (AFL-CIO/CLC); Independent Radionic Workers of America; and Industrial Union Department (AFL-CIO).

Frank W. Hunger, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Velta A. Melnbrencis), Rebecca Rejtman,* Attorney Advisor, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

White & Case (William J. Clinton, David E. Bond and *Anna-Marie Christello-Roop)* for defendant-intervenor Proton Electronic Industrial Co., Ltd.

OPINION

RESTANI, *Judge:* This action contests the final results of the sixth administrative review of an antidumping duty order. The challenged determination is *Color Television Receivers. Except for Monitors, from Taiwan,* 57 Fed. Reg. 3740 (Dep't Comm. 1992). The issue before the court is whether the United States Department of Commerce is now using a proper methodology under 19 U.S.C. § 1677a(d)(1)(C) (1988) for computing an adjustment to United States Price ("USP") for a value added tax forgiven upon export of the televisions.

Commerce's new methodology applies the home market tax rate to the exported merchandise at the same point in the U.S. chain of commerce as the foreign tax is applied in the home market. The VAT USP adjustment is also calculated in a manner that accounts for the difference between the home market tax base and U.S. tax base caused by import duties and their drawback or non-collection. This methodology has been approved in several cases. *See, e.g., Independent Radionic Workers of America v. United States,* 862 F. Supp. 422, 426 (Ct. Int'l Trade 1994); *Avesta Sheffield, Inc. v. United States,* Slip Op. 94–53 (Mar. 31, 1994). The remand requested by defendant shall be conducted in accordance with these decisions.

The results of the remand are due within 45 days hereof. Any objections and responses to such objections shall be filed within 11 and 5 days thereafter, respectively.

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